

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

March 7, 2006

In the Matter of
Removal Specialists

Docket No. 2006-011
File No. PAN-NE-05-9001-24C
Lynn

RECOMMENDED FINAL DECISION

This case is an appeal of a Notice of Intent to Assess a Civil Administrative Penalty (PAN) issued by the Department to Removal Specialists for alleged violations of air quality asbestos requirements, as well as hazardous and solid waste management standards. I now recommend that this matter be dismissed for lack of jurisdiction due to the untimeliness of the appeal.

After the petitioner filed its Notice of Claim (Claim), I issued an Order for a More Definite Statement requiring the petitioner to submit a copy of the appealed document, and in response the petitioner provided a copy of the PAN to this office. The PAN is signed by Richard J. Chalpin, the Regional Director of the Department's Northeast Regional office, with a handwritten date below his signature. Because the date could be read as December 22nd or 27th, there was some question about its date of issuance, and consequently the timeliness of the petitioner's Claim. I therefore issued another Order offering the opportunity for the parties to present evidence and their respective views on the timeliness of the petitioner's Claim.

For special accommodations for this event, contact Deneen M. Simpson at this address or call (617) 556-1003.
This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057. TDD Service - 1-800-298-2207.

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The PAN includes information on the appeal rights associated with the document, and the time period for asserting that right. Paragraph 12(2) of the PAN provides:

Effective twenty-one (21) days after the date of issuance of this Notice, Removal Specialists shall be deemed to have waived its right to an adjudicatory hearing on this civil administrative penalty assessment unless, within said twenty-one (21) days, Removal Specialists files with the Department (i.e. the Department receives), a written statement pursuant to 310 CMR 1.00...

These instructions are consistent with the requirements of M.G.L. c. 21A, §16 and the regulations at 310 CMR 5.35. The right to request a hearing is waived unless “within 21 days of the date of issuance of the Penalty Assessment Notice, such person files with the Department (*i.e. the Department receives*) a written statement ...” requesting a hearing. 310 CMR 5.35. Furthermore, the deadline for filing appeals is a jurisdictional matter that cannot be waived. Failure to file a request for an adjudicatory appeal within the prescribed time period requires dismissal of the claim. Matter of Sunoco Inc. (R&M), Docket No. 2003-035, Recommended Final Decision (September 16, 2003) adopted by Final Decision dated October 1, 2003; Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision 11 MELR 1179 (May 13, 1993).

The petitioner and the Department both filed Responses described in detail below.

Date of Issuance

Determining whether an appeal of a PAN is timely must start with determining the date of issuance of the PAN. The administrative penalty regulations define the date of issuance in 310 CMR 5.08 differently depending on how the document is delivered. If the PAN was mailed, the date of issuance pursuant to 310 CMR 5.08 would be the date of the postmark on the envelope conveying the document.

In its Response to the Order to Show Cause, the Department states that both the PAN and its accompanying cover letter were executed (or signed) by the Department on December 22, 2005. The Department also submitted the Affidavit of Karen Golden-Smith indicating that she prepared the certified mail documentation and caused the PAN to be mailed on December 22, 2005. Affidavit, paragraph 1. The Department also provided copies of the certified mail receipt “green card” (with certified mail # 7003-3110-0001-6107-7142) evidencing delivery to Shawn and Doug Corp. d/b/a Removal Specialists on December 27, 2005. Affidavit of Karen Golden-Smith. The certified mail receipt, a copy of which was also provided by the Department, has a place for the postmark, which is blank.

The petitioner’s response indicated that it received both the PAN and a Unilateral Administrative Order (UAO) on the same day (“on or about December 28th”), and that limited work schedules of its personnel and the Department’s employees during the holiday season, as well as slower holiday postal delivery time should be considered in determining the timeliness of the Claim. The petitioner also provided copies of the PAN and UAO, and most importantly provided a copy of an envelope addressed from the Department’s Northeast Regional Office to Shawn and Doug Corp., d/b/a Removal Specialists at 124 Range Avenue in Lynn, Massachusetts. The envelope is postmarked December 23, 2005 and bears certified mail # 7003-3110-0001-6107-7142, the same number which appears on the Department’s green card.

I find the Department’s cover letter and the PAN itself were signed on December 22, 2005, and sent certified mail return receipt requested, to the petitioner. The postmarked date on the envelope provided by the petitioner and bearing certified mail number 7003-3110-0001-6107-7142 is December 23rd, and I therefore find that the PAN was postmarked and issued on December 23, 2005. The twenty-one day time period for requesting an adjudicatory appeal

began the day after the PAN is issued. 310 CMR 5.07. The twenty-first day after December 23, 2005, or the last day the petitioner had to request an appeal, was consequently January 13, 2006.

Date the Petitioner's Claim was received

The petitioner's Notice of Claim was received at the Department first on January 19, 2006 at the Department's Lockbox, and was then forwarded to this Office. The document is stamped received in this Office on January 23, 2006. Because the petitioner's Claim was not received by the Department within twenty-one days of the date of issuance of the PAN, or by January 13, 2006, the petitioner waived its right to request an adjudicatory hearing.

Although the petitioner has requested reconsideration of the timeliness of the Claim because of holiday postal delivery delays and the limited work schedules both at the petitioner's business and the Department, no discretion is granted the agency to allow late filed appeals. Timeliness of an initial Claim is a jurisdictional prerequisite that cannot be waived. Matter of Sunoco Inc. (R&M), Docket No. 2003-035, recommended Final Decision (September 16, 2003) adopted by Final Decision dated October 1, 2003.

The petitioner also claims to have attempted to contact the Department's technical staff identified as contacts in the UAO and PAN during the 21 day appeal period, in order to ask questions about the documents and the necessary actions required, with no success. At some point the petitioner did speak with Karen Golden-Smith of the Department. She did not have the requested information, but told the petitioner she would contact another Department employee, John Macauley, for the petitioner and ask Mr. Macauley to return the petitioner's call. The petitioner further states that Karen Golden-Smith "also stated that the filing deadline would be extended to allow proper time for our questions and requirements to be clarified."

To the extent the petitioner is claiming silence from the Department's employees or an oral assurance of an extension should toll the statute of limitations for filing an adjudicatory appeal, it is a request not within the Department's power to grant. Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision 11 MELR 1179 (May 13, 1993). If the petitioner is suggesting that the Department should not be allowed to argue this appeal was untimely because his phone calls were not returned by Mr. Macauley or because of Ms. Golden-Smith's statement concerning an extension of time, such arguments do not provide a basis for allowing a late filed claim to proceed. The information about the time period for filing an appeal was included in the PAN, and although unexplained, the Department's silence in the face of the petitioner's phone messages cannot extend a statutory time limit for filing an appeal. I also note that estoppel against the government in the exercise of official business is disfavored. A.P. East v. Board of Assessors of Westborough, 40 Mass App. Ct. 912, 661 N.E.2d 1344 (1996) [where the date of mailing tax bills was established, subsequent actions of municipal officials are irrelevant to determine whether abatement applications were filed within the time period permitted by statute.] Often quoted, the following sentence explains this point. "In Massachusetts, one relies at his peril on representations by a government official concerning legal requirements. [citations omitted] Particularly where misstatements about the effect of applicable rules and regulations relied upon are oral, reliance on them may not be regarded as reasonable." Harrington v. Fall River Housing Authority, 27 Mass. App. Ct. 301, 309-310, 538 N.E.2d 24 (1989).

I recommend that the Department's Motion to Dismiss be granted and this claim be dismissed for lack of jurisdiction, pursuant to 310 CMR 1.01(5)(a)15.f.v. as the petitioner's Notice of Claim for a hearing was untimely.

NOTICE

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion directs otherwise.

**This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.**

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., March 9, 2006.